STATE OF MICHIGAN
IN THE SUPREME COURT

Leslie J. Murphy,

Plaintiff-Appellant,

v.

Samuel M. Inman, III, John F. Smith, Bernard M. Goldsmith, William O. Grabe, Lawrence David Hansen, Andreas Mai, Jonathan Yaron, and Enrico Digirolamo,

Defendants-Appellees.

Supreme Court Case No. 161454

Court of Appeals Case No. 345758

Oakland County Circuit Court Case No. 2017-159571-CB

Filed under AO 2019-6

Defendants-Appellees' Answer to Plaintiff-Appellant's Application for Leave to Appeal

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether Plaintiff's breach of fiduciary duty claim for alleged breach of fiduciary duties under MCL 450.1541a and common law, challenging a corporate merger transaction ratified by a majority shareholder vote, is barred because the claim is derivative yet Plaintiff failed to follow the requirements for a derivative claim and brought it as a direct claim instead.

Plaintiff-Appellant answers:	No.
Defendants-Appellees answer:	Yes.
The Circuit Court answered:	Yes.
The Court of Appeals answered:	Yes.
This Court should answer:	Yes.

INTRODUCTION

The summary dismissal from which Plaintiff-Appellant ("Plaintiff") appeals resulted entirely from deliberate tactical decisions that Plaintiff now regrets. Michigan law sets out a process through which shareholders can challenge a merger transaction they believe is unfair and a breach of fiduciary duties. Such a claim is derivative in nature, and Michigan law has established mandatory procedures that shareholders must follow to make derivative demands and bring derivative claims. Plaintiff simply elected not to follow the derivative action procedures. Instead, Plaintiff seeks to have this Court substitute itself for the Michigan legislature, rewrite Michigan's statutes, and remake the law, all as a remedy for Plaintiff's own failed litigation strategy.

Plaintiff's Application and arguments are notably bereft of any supporting Michigan statutory or case law. That is because existing Michigan law is consistent with the arguments of Defendants-Appellees ("Defendants") and the decisions of the Court of Appeals and Circuit Court in this case. Instead, Plaintiff places all of his chips on a gamble to have this Court not just ignore, but completely throw out, existing Michigan authority and rewrite Michigan law to match the common law of a handful of other jurisdictions that purportedly are more to Plaintiff's liking. There is no basis for such extreme judicial activism, and indeed Plaintiff is in no position to complain about the applicable law of this jurisdiction, having chosen to bring his case here and fought to remand it here after Defendants removed to federal court.

Additionally, Plaintiff's insistence that the lower courts' decisions effectively leave him and other similarly situated shareholders without legal recourse is incorrect; there were numerous potential avenues for recourse, some of which other of Plaintiff's fellow shareholders pursued. Plaintiff just chose not to join them or otherwise pursue those avenues, and his chosen alternative path is not permitted under Michigan law.

Meanwhile, Plaintiff's argument that this Court has not "meaningfully" addressed this issue and so should step in and clarify (read: change) the law is simply not true. Further, Plaintiff's claim that Michigan courts have "misapplied" the common law test for whether a

claim is derivative or direct is misguided, as Plaintiff's only support for that contention are cases from *other jurisdictions*. Plaintiff's argument, then, is that Michigan courts misapplied Michigan common law because certain *other states' courts* applying *other states' common law* came to a different result.

Lastly, this Court can and should deny Plaintiff's Application and affirm the Court of Appeals' decision on the separate and independently sufficient basis that Plaintiff's claim fails as a matter of law due to the majority shareholder vote approving the Merger.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiff's purported statement of facts and procedural history omits critical information and mischaracterizes Plaintiff's own allegations while trying to obscure the fact that this case involves nothing more than a shareholder unhappy with a merger attempting to undo and overturn the will of the majority of Covisint shareholders who voted in favor of it.

I. The Merger and related litigation

On June 5, 2017, Covisint publicly announced that it had entered into an Agreement and Plan of Merger ("Merger Agreement") through which a wholly-owned subsidiary of OpenText ("Merger Sub") would merge with and into Covisint, and each share of Covisint's common stock (other than shares held by Covisint, OpenText, Merger Sub, or any of their subsidiaries) would be converted into the right to receive $2.45 in cash. (*See* Appellees' Ex. 16 (Amended Complaint for Breach of Fiduciary Duties ("FAC")) ¶ 3 (App'x 037e–038e); *see also* Appellees'

Ex. 1[1] (App'x 004a).)[2] The announcement included a copy of the Merger Agreement. (Appellees' Ex. 1 (App'x 011a).)

On June 15, 2017, Covisint detailed the proposed transaction and the exhaustive process that led to it in a Preliminary Proxy Statement filed with the SEC ("Preliminary Proxy"). (Appellees' Ex. 2, (App'x 003b).) Covisint's Preliminary Proxy was over 80 pages in length and included detailed information on Covisint's business and financial results, a full description of the long negotiation process and numerous meetings with potential bidders, and the reasons the Board determined to unanimously approve the Merger in the best interests of Covisint and its shareholders. (*See generally id.*) It also summarized financial projections provided to Evercore Group L.L.C. ("Evercore"), the financial advisor Covisint retained to help explore the strategic alternatives, and it included Evercore's fairness opinion. (*See id.* at 46–50, Annex C (App'x 055b–059b, 167b).) The Preliminary Proxy also included a detailed discussion of the Merger Agreement and the agreement was attached as an appendix for shareholders to review. (*See id.* at Annex A (App'x 096b).)

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[1] All Exhibits cited in this Answer are publicly available Michigan or federal court or SEC filings, and Appellees' Exhibits 1–3 and 9 are also referenced and/or relied upon in Plaintiff's FAC. (*See*, *e.g.*, FAC ¶¶ 3, 9–11, 17, 108, 126, 140, 146–65 (App'x 037e–038e, 040e–041e, 043e, 069e, 074e–075e, 080e–089e).) The Exhibits are thus "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," and so the Court may consider and take judicial notice of—and Defendants hereby request this Court consider and take judicial notice of—the Exhibits in deciding Plaintiff's Application. MRE 201(b); *see* MCR 2.113(C)(2); MCR 2.116(G)(2), (5); *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 301 n 1 (2010).

[2] The citations to appendices in this brief work as follows: "App'x ___a" is a citation to a specific page in volume A of the Defendants-Appellees' Appendix filed concurrently herewith; "App'x ___b" is a citation to volume B of Defendants-Appellees' Appendix filed concurrently herewith; and so on.

As the Preliminary Proxy detailed, Covisint had explored all strategic alternatives (including with Evercore's assistance) for more than one year before agreeing to the Merger. (*Id.* at 26–42 (App'x 035b–051b).) Evercore (a) met with 52 potential bidders (both financial and strategic), (b) distributed confidential information memorandums to 22 potential bidders, (c) distributed process letters to 13 potential bidders, (d) arranged for nine potential bidders to have meaningful and substantial management meetings with Covisint management, (e) received preliminary written indications of interests from four potential bidders, and (f) received final bids from four potential bidders. (*Id.* at 41 (App'x 050b).) As further detailed in the Preliminary Proxy, at every turn, Evercore advised Covisint's Board about communications with potential bidders and their offers and/or interest level. (*Id.* at 28–42 (App'x 037b–051b).)

The Merger transaction represented a premium to Covisint shareholders of between 23% and 46% per share over the price at which the stock had been trading on the public market. (*See id.* at 10, 43 (App'x 019b, 052b).) As there were approximately 40.9 million outstanding shares of Covisint stock at the time, the total consideration to be paid to the shareholders exceeded $100 million. (*See* FAC ¶ 9 n 4, 167 (App'x 040e, 089e).) The Preliminary Proxy also detailed, *inter alia*, the treatment of stock options held pursuant to Covisint's Long Term Incentive Plan (the "LTIP") and the benefits that the Merger would yield, pursuant to existing severance agreements, for Samuel M. Inman, III (Covisint's President and Chief Executive Officer), Enrico Digirolamo (Covisint's Chief Financial Officer), and Steven Asam (Covisint's Senior Vice President of Delivery Operations and Engineering). (Appellees' Ex. 2 at 60–62 (App'x 069b–071b).) The "unique benefits" about which Plaintiff raises concern were thus all properly and timely disclosed to shareholders prior to the vote on the merger.

Shortly after the Preliminary Proxy was filed, three putative class actions other than, but related to, this lawsuit were filed in the names of other shareholders as plaintiffs in the United States District Court for the Eastern District of Michigan, two of which cases were filed before this lawsuit began and the third of which was filed days after this lawsuit commenced. Those suits were brought against substantially the

same defendants, concerned the same Merger, and were consolidated as *In re Covisint Corp. S'holder Litig.*, Civil Action No. 2:17-cv-11958-RHC-DRG (E.D. Mich.) (collectively, "Prior Filed Federal Actions"). (*See* Appellees' Ex. 6 at 1 (App'x 186c).) The plaintiffs in the Prior Filed Federal Actions filed a motion seeking to enjoin the shareholder vote on the Merger. (*Id.*)

In addition to the robust disclosures in the Preliminary Proxy and the Definitive Proxy Statement filed June 26, 2017 (*see* Appellees' Ex. 3 (App'x 003c)), on July 6, 17, 21, and 24, 2017, Covisint filed supplements to the proxy statement. (*See* Appellees' Exs. 4–5, 7–8 (App'x 173c, 179c, 189c, 196c).)[3] Also, shareholder Dialectic Capital Management LLC ("Dialectic") published a public letter to Covisint shareholders on July 19, 2017, announcing it intended to vote against the Merger, and urging others to do the same, because, Dialectic said, it felt the deal failed to maximize shareholder value and Covisint should pursue other strategic options (raising the same issues as Plaintiff's FAC alleges). Covisint discussed and responded to Dialectic's concerns in its July 21, 2017 supplement to the proxy statement. (*See* Appellees' Ex. 7 (App'x 189c).)

The plaintiffs in the Prior Filed Federal Actions withdrew their motion for injunction in light of Covisint's supplemental proxy statements. (*See* Appellees' Ex. 6 at 1 (App'x 186c).)

Following Covisint's thorough disclosures concerning the Merger in its initial Preliminary and Definitive Proxy Statements and its supplements thereto, on July 25, 2017, Covisint held a special meeting of its shareholders at which they considered and voted on the Merger. (*See* Appellees' Ex. 9 (App'x 202c).) The Merger was approved by 60.76% of the shares that voted, (*id.*), which represented 52.17% of all outstanding shares, (*id.*; FAC ¶ 9 (App'x 040e)). Specifically, of the 40,885,818 shares Plaintiff Murphy alleges were outstanding at the

[3] Plaintiff conspicuously fails to mention the supplemental proxy statements, which is particularly noteworthy because the plaintiffs in the Prior Filed Federal Actions acknowledged that the supplemental proxy statements sufficiently addressed their alleged concerns and deficiencies and consequently voluntarily dismissed their cases.

close of business on the record date, (FAC ¶ 9 n 4 (App'x 040e)), a total of 35,103,897 shares cast votes as follows: 21,331,741 shares voted "For;" 13,709,858 shares voted "Against;" and 62,298 shares voted "Abstain." (Appellees' Ex. 9 (App'x 202c).) The Merger was consummated on July 26, 2017. (Appellees' Ex. 10 at 2 (App'x 206c).)

On September 27, 2017, the parties in the Prior Filed Federal Actions filed a Stipulation and Order of Dismissal, in which the plaintiffs in those cases acknowledged that Covisint's July 17, 2017 supplement to the proxy statement "substantially addressed and mooted their claims," and stipulated to the dismissal of the Prior Filed Federal Actions (with prejudice as to the named plaintiffs and without prejudice as to the putative class) in light of Covisint's supplement to the proxy statement, the voluntary withdrawal of a Preliminary Injunction Motion that had been filed in one of the actions, and the approval of the Merger by a majority of Covisint's shares. (Appellees' Ex. 10 at 2–5 (App'x 206c–209c).) The court approved and entered the Stipulation and Order of Dismissal the following day, on September 28, 2017. (*Id.*)

Plaintiff-Appellant Murphy remains the sole shareholder asserting a claim concerning the Merger.

II. Procedural history of this (*Murphy*) action

On June 30, 2017, Plaintiff-Appellant Murphy filed a complaint initiating this putative shareholder class action against Defendants, alleging essentially the same conduct and claims as the Prior Filed Federal Actions, but not seeking to enjoin the transaction. (Appellees' Ex. 17 (Complaint for Breach of Fiduciary Duties ("Compl.")) (App'x 096e).) Murphy's Complaint sought damages and rescission of the Merger Agreement. (*Id.* at ¶¶ 32, 161–68, Prayer for Relief (App'x 105e, 145e–147e).) Following the approval and consummation of the Merger, Plaintiff filed the FAC on September 5, 2017. (FAC (App'x 036e).) The FAC alleged a breach of fiduciary duty claim under Section 541a, alleging that Defendants breached their fiduciary duties by acting in their own self-interest in pursuing and agreeing to the Merger. (*Id.* at ¶¶ 35, 171–78, Prayer for Relief (App'x 046e, 091e–093e).)

On October 6, 2017, Defendants filed a Notice of Removal, removing this action to the United States District Court for the Eastern District Michigan to consolidate it with the earlier filed actions. (*See* Notice of Filing Notice of Removal, Oct. 6, 2017.) On November 6, 2017, Plaintiff filed a motion to remand and on February 21, 2018, the Eastern District of Michigan ordered this case remanded to the State of Michigan Circuit Court for the County of Oakland. (*See* Appellees' Ex. 11 at 1, 29 (App'x 213c, 241c).) On March 23, 2018, Defendants filed a Motion for Summary Disposition under MCR 2.116(C)(5) and 2.116(C)(8). (*See* Appellees' Ex. 14 (Defendants' Motion for Summary Disposition and Brief in Support of Motion, Mar. 23, 2018 ("Mot.")) (App'x 218d).) Plaintiffs filed an opposition on May 16, 2018. (*See* Appellees' Ex. 13 (Plaintiff's Brief in Opposition to Defendants' Motion for Summary Disposition, May 16, 2018 ("Opp.")) (App'x 027d).) Defendants filed a reply on May 30, 2018. (*See* Appellees' Ex. 15 (Defendant's Reply in Support of Motion for Summary Disposition, May 30, 2018 ("Reply")) (App'x 003e).) Judge Potts held a hearing on Defendants' motion on June 13, 2018. On September 17, 2018, Judge Potts entered an order granting Defendants' Motion for Summary Disposition under MCR 2.116(C)(5) (the "Potts Order").[4]

Judge Potts—citing and quoting this Court's decision in *Christner v Anderson, Nietzke & Co, PC*, 433 Mich 1 (1989), and the Court of Appeals' decision in *Mich Nat'l Bank v Mudgett*, 178 Mich App 677 (1989) (per curiam)—identified the general rule under Michigan law that a suit to enforce corporate rights or redress or prevent injury to the corporation must be brought in the name of the corporation, with the only two exceptions being where the shareholder shows a violation of a duty owed directly to him (other than one that harmed both the corporation and the shareholder) and where the shareholder has sustained a loss separate and distinct from that of other stockholders generally. Potts Order 3. Judge Potts then found that Plaintiff's claim is derivative:

> While Plaintiff alleges an injury to himself as a shareholder, the alleged injury affects both the corporation

[4] The Potts Order was attached as Exhibit 2 to Plaintiff's Application.

> and himself. Plaintiff alleges that Defendants' breaches of their fiduciary duties resulted in an unfair price for his shares. Such an alleged injury affects the corporation itself in the same manner that it affects Plaintiff, i.e. the price of the company's stock was lower than it would have been had Defendants not breached their fiduciary duties. In other words, Plaintiff cannot demonstrate an injury to himself without showing an injury to the corporation. Further, Plaintiff has not alleged an injury that is separate and distinct from that of other shareholders generally. Because Plaintiff's breach of fiduciary duty claim alleges an injury that was derivative of the injury caused to the corporation itself, Plaintiff was required to bring the claim on behalf of the corporation rather than individually. [Potts Order 4 (citations omitted).]

Judge Potts further held that "Plaintiff's attempt to distinguish a breach of fiduciary duty claim brought under MCL 450.1541a from a claim based on common law is a distinction without a difference," and that either way the claim must have been (but was not) brought derivatively. *Id.* 4-5. Judge Potts thus granted Defendants' motion for summary disposition under MCR 2.116(C)(5). *Id.* 5.

Plaintiffs filed a claim of appeal on October 4, 2018. (*See* Claim of Appeal, Oct. 4, 2018.) Following the parties' briefing and oral argument, the Court of Appeals entered a decision affirming Judge Potts' order granting summary disposition in favor of Defendants, correctly finding that Plaintiff's claim is derivative and his failure to follow the statutory requirements for bringing a derivative claim defeats his action (the "COA Op.").[5]

The Court of Appeals first echoed Judge Potts in "reject[ing] Plaintiff's attempts to separate his singular claim—defendants' alleged breach of their fiduciary duties—into statutory and common-law grounds" and finding that "the distinction [P]laintiff attempts to make does not alter the outcome," including because the claim "relies on the

[5] The COA Op. was attached as Exhibit 1 to Plaintiff's Application.

same facts and complains of the same alleged injury." COA Op. 3. The Court of Appeals then analyzed MCL 450.1541a (sometimes referred to herein as "Section 541a") and the Michigan cases evaluating that statute, and concluded that "an action brought under § 541a seeks to redress wrongs to the corporation" and so Plaintiff "could not bring a direct statutory claim" thereunder. *Id.* 3-4. Turning to the common law framework under Michigan law, the Court of Appeals set out the general rule and two exceptions, as did Judge Potts, before holding that Plaintiff's claim is derivative, finding that Plaintiff "makes no allegation that there was a breach of duty owed directly to the shareholders, independent of the corporation," as "Defendants' strategic decision to sell and their decisions made in connection with that sale, as well as their general duty to maximize shareholder value, are not duties owed directly to the shareholders that is distinct from, or independent of, the corporation," and further finding that Plaintiff "cannot show that he has sustained injury that is separate and distinct from that of other shareholders." *Id.* 4-5. The Court of Appeals also found that Plaintiff's duty of candor allegations are "legally indistinguishable from the others" and so fail for the same reasons. *Id.* 5. The Court of Appeals thus found no error in the Circuit Court's granting of summary disposition to Defendants and so affirmed. *Id.*

Plaintiff's Application followed.

ARGUMENT

I. Plaintiff fails to establish any proper basis for appeal of the Court of Appeals Order

A. Plaintiff's Application fails to clearly identify the purported grounds on which it is based

The Application styles this appeal as being brought pursuant to MCR 7.305(B)(3), which requires that the issue on appeal "involve[] a legal principle of major significance to the state's jurisprudence." (*See* Appl. 1 ("The issue raised by this appeal 'involves a legal principle of major significance to the state's jurisprudence' (MCR 7.305(B)(3)) . . . ."); *see also*, *e.g.*, *id.* 7, 12–13, 16–17 (framing the issue as "an issue of major significance" and asking the Court to provide clarity and guidance).) Yet

peppered in a few places in the Application are references to MCR 7.305(B)(5)(a), which requires that the decision of the Court of Appeals "is clearly erroneous and will cause material injustice." (*See* Appl. 2, 8–9, 14, 17.) Plaintiff's Application notably lacks detailed argument or explanation either how the legal principle raised is "of major significance to the state's jurisprudence" or how the Court of Appeals opinion was clearly erroneous and would cause material injustice. Plaintiff instead does little more than name-check these standards before arguing in conclusory fashion that the decision should have come out the way he prefers.

Regardless of the grounds Plaintiff invokes, the Application fails to raise an issue warranting appeal and so it should be denied.

B. The Court of Appeals correctly held that Plaintiff's claim fails because it is derivative yet Plaintiff failed to follow the procedures required for a derivative claim and brought it as a direct claim instead

1. Plaintiff has no direct claim for breach of fiduciary duty under Section 541a

The Court of Appeals held that "an action brought under § 541a seeks to redress wrongs to the corporation" and that accordingly "the statutory claim should generally be brought by the corporation or a shareholder on behalf of the corporation." COA Op. 4. That holding was correct and certainly not clear error.

Indeed, extensive, well-established Michigan case law confirms that claims under Section 541a redress harms to corporations *and must be brought by either the corporation itself or by a shareholder as a derivative action*. See *Estes v Idea Eng'g & Fabricating, Inc*, 250 Mich App 270, 285 (2002) (explaining the "plaintiff in a § 541a action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation"); *see also id.* at 282 ("'[A] § 541a suit seeks to redress wrongs to the corporation.'" (quoting, and adopting as its own language, *Baks v Moroun*, 227 Mich App 472, 505 (1998) (Hoekstra, J. dissenting), *overruled on other grounds by Estes*, 250 Mich App 270); *Coppola v Manning*, No 323994, 2015 Mich App LEXIS 2152,

at *8 (Mich Ct App Nov 17, 2015) (per curiam) (App'x 012f) (citing and quoting *Estes* for holding that Section 541a claim redresses wrongs to the corporation and is brought by the corporation itself (directly) or the shareholder derivatively); *McCarthy v Miller*, No 231829, 2003 Mich App LEXIS 471, at *7 (Mich Ct App, Feb 21, 2003) (per curiam) (App'x 019f) ("To the extent that plaintiff relies on MCL 450.1541a to claim that he has standing to bring claims in his individual capacity, we reject the argument. A § 541a action seeks to redress wrongs to the corporation. *Estes*, [250 Mich App] at 282. In *Estes,* [*id.*] at 285, this [c]ourt stated that 'a plaintiff in a § 541a action is a corporation suing for breach of a duty to the corporation or a shareholder suing derivatively on behalf of the corporation.'"). Thus, there can be no direct shareholder claim under Section 541a.

Plaintiff fails, as he failed below, to cite any authority holding that a Section 541a claim can be brought directly or in any way other than by a corporation directly or a shareholder derivatively. Indeed, Plaintiff ignores this argument and the Michigan statute almost entirely,[6]

[6] Plaintiff's sole (fleeting) reference to Section 541a comprises just three sentences of a full-page, multi-paragraph footnote, in which Plaintiff argues that the Court of Appeals' reasoning concerning Section 541a was flawed because it found directors must "act in the best interest *of the corporation*," yet a comment to the Model Business Corporation Act indicates the term "corporation" is a frame of reference encompassing the shareholder body in addition to just the business enterprise, and thus that directors have a duty to act in the best interests of the company *and its shareholders*. (Appl. 14 n 5.) Plaintiff's argument is misplaced. It notably cites no Michigan authority on point and instead relies solely on the Model Business Corporation Act's comment about what "corporation means" thereunder. But Michigan's statute defines "corporation" as simply "a corporation formed under [the Michigan Corporations Act] while defining shareholders separately. See MCL 450.1106(1); MCL 450.1109(2). Moreover, the Court of Appeals acknowledged that directors owe fiduciary duties to stockholders in addition to the corporation, but then confirmed that while that is the case, "'a suit to enforce corporate rights or to redress or prevent injury

seemingly focusing instead on the notion of a separate, common law claim for breach of fiduciary duty. (*See generally* Appl.) But that argument fails as well.

2. Plaintiff has no direct claim for breach of fiduciary duty under any common law duty standard

Contrary to what Plaintiff's argument suggests, he did not bring separate statutory and common law claims for breach of fiduciary duties. Plaintiff's initial complaint and FAC both included just a single cause of action, for breach of fiduciary duties, which invoked Section 541a as well as referencing common law duties. (Compl. pp. 50-51 (App'x 145e–146e); FAC pp. 56-57 (App'x 091e–092e).) The statutory and common law "claims" are based on the same facts and arguments. Plaintiff cites no authority for the notion of a common law claim that could survive where a claim under the statute, based on the same facts and alleged duties, could not, nor that the derivative-versus-direct analysis would differ for them.[7] The Court of Appeals correctly held that the purported statutory and common law claims are inextricable from each other and that the outcome is the same in any event, as did the Circuit Court before it. COA Op. 3 ("As an initial matter, we reject [P]laintiff's attempts to separate his singular claim—[D]efendants' alleged breach of their fiduciary duties—into statutory and common-law grounds."); Potts Order 4 ("Plaintiff's attempt to distinguish a breach of

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to the corporation . . . must be brought in the name of the corporation and not that of a stockholder, officer, or employee.'" COA Op. 4 (quoting *Mudgett*, 178 Mich App at 679). Thus, the Court of Appeals directly addressed Plaintiff's argument, but Plaintiff conspicuously omits that discussion to manufacture this argument.

[7] Even a breach of fiduciary duty claim styled as arising under the common law has been deemed subject to the statutory limitations of Section 541a. In *Coppola*, the Court of Appeals applied Section 541a to a plaintiff's breach of fiduciary duty claim, despite the plaintiff's complaint's lack of reference to Section 541a and its mere reference to "Michigan statutory and common law" duties. 2015 Mich. App. LEXIS 2152, at *9 n 1.

fiduciary duty claim brought under MCL 450.1541a from a claim based on common law is a distinction without a difference.").[8]

Regardless of how Plaintiff chooses to style his claim, Plaintiff cannot establish a valid basis under common law for bringing his claim directly. Instead, he was required to bring his claim derivatively, and so it must be dismissed because he failed to do so.

a. Plaintiff waived his duty of candor claim by failing to raise it before the Circuit Court

As an initial matter, to the extent Plaintiff purports to advance a claim for breach of the duty of candor (on the theory that Covisint's proxy statements were materially deficient), he waived that argument because he failed to raise it before the Circuit Court. (See generally Opp. (App'x 027d), Appellees' Ex. 12 (*Murphy v. Inman* MSD Hr'g Tr., June 13, 2018) (App'x 003d).)

In Michigan, for "'an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court.'" *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192 (2018) (quoting *Mouzon v Achievable Visions*, 308 Mich App 415, 419

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[8] Plaintiff's Application claims that "[i]n the decision below, the Court of Appeals found that the duty to maximize shareholder value and duty of candor are common-law duties rather than duties subsumed within the statutory duties codified in MCL 450.1541a." (Appl. 14 n 5 (citing COA Op. 4-5).) That is patently false as to the purported "duty to maximize shareholder value." While the Court of Appeals briefly noted that the duty of candor is a common-law duty, COA Op. 5 n 2, at no point did it make such a finding as to the purported "duty to maximize shareholder value," *id.* 3–5. Rather, the Court of Appeals began its analysis by "reject[ing] [P]laintiff's attempts to separate his singular claim—defendants' alleged breach of their fiduciary duties—into statutory and common-law grounds," agreed with the Circuit Court that Plaintiff's attempted distinction "does not alter the outcome," then analyzed, in turn, the statutory and common frameworks for determining whether a claim is derivative or direct, before finally finding that under both statutory and common law, Plaintiff's claim is derivative. *Id.* 3–5.

(2014)). Accordingly, "[t]he failure to timely raise an issue typically waives appellate review of that issue." *Jawad A Shah, MD*, 324 Mich App at 192 (citing *Walters v Nadell*, 481 Mich 377, 387 (2008)).

A court "'may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented.'" *Jawad A Shah, MD*, 324 Mich App at 192–93 (quoting *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427 (2006)). Despite having this power, however, the Michigan Supreme Court has emphasized that "'such power of review is to be exercised quite sparingly' and that the inherent power to review unpreserved issues 'is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a [criminal] defendant a fair trial.'" *Jawad A Shah, MD*, 324 Mich App at 193 (alteration in original) (citing and quoting *Napier v Jacobs*, 429 Mich 222, 233 (1987)). Additionally, "a litigant in a civil case must demonstrate more than a potential monetary loss to show a miscarriage of justice or manifest injustice." *Jawad A Shah, MD*, 324 Mich App at 194 (citing *Napier*, 429 Mich at 234). See also *Napier*, 429 Mich at 233–34 (noting that one who *would* experience such injustice would be a "criminal defendant faced with imprisonment who claims for the first time on appeal that the evidence at trial was insufficient to support the verdict," and that "more than the fact of the loss of [a] money judgment of $60,000 in [a] civil case is needed to show a miscarriage of justice or manifest injustice"); *Snell v Snell*, No 342673, 2019 Mich App LEXIS 77, at *9 (Mich Ct App, Jan 17, 2019) (per curiam) (App'x 027f) ("Yet, even when there exists a basis for waiving preservation requirements, [the Michigan] Supreme Court has cautioned that appellate courts should exercise their discretion sparingly and only when there are exceptional circumstances that warrant review.") (citing *Napier*, 429 Mich at 233).

Here, Plaintiff failed to raise a duty of candor argument before the Circuit Court. Moreover, consideration of this issue is not necessary for a proper determination of the case and no injustice will be caused by waiver, particularly given (as the Court of Appeals correctly held) that the duty of candor claim is "legally indistinguishable" from the rest of

Plaintiff's claim, as it alleges the same harm on the same alleged facts and circumstances. COA Op. 5. As such, this Court should hold that Plaintiff waived any claim as to the duty of candor.[9]

Even if a duty of candor claim had been properly preserved and were considered by this Court, it—like the entirety of Plaintiff's claim—fails because it is derivative yet Plaintiff chose to bring it as a direct claim.

b. Plaintiff's claim is derivative under Michigan's common law framework

Despite the fact that directors of a corporation owe fiduciary duties to the corporation and its stockholders, "a suit to enforce corporate rights or to redress or prevent injury to the corporation, whether arising out of contract or tort, must be brought in the name of the corporation and not

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[9] Additionally, duty of candor claims are regularly dismissed at the pleadings stage where, as here, plaintiffs fail to establish that defendants' disclosures in connection with a transaction omitted facts material to the transaction and stockholders' understanding of the transaction. See *Sheldon v Pinto* Tech *Ventures, LP*, No 2017-0838-MTZ, 2019 Del Ch LEXIS 34, at *31–34 (Del Ch, Jan 25, 2019) (App'x 032f); *Frederick v Corcoran*, No 370685-V, 2013 Md Cir Ct LEXIS 5, at *42–43 (Md Cir Ct, Aug 14, 2013) (App'x 048f). This is particularly true where, as here, the transaction was subsequently approved by an uncoerced fully informed majority of disinterested stockholders. *See In re Rouse Props Fiduciary Litig*, 2018 Del Ch LEXIS 93, No 12194-VCS, at *48–57 (Del Ch, Mar 9, 2018) (App'x 062f); *In re Solera Holdings, Inc Stockholder Litig*, No 11524-CB, 2017 Del Ch LEXIS 1, *22–33 (Del Ch, Jan 5, 2017) (App'x 087f); Section II, *infra*. Defendants thoroughly addressed and disposed of Plaintiff's grab bag of supposed proxy disclosure deficiencies below. (*See* Mot. at 15–16 (App'x 233d–34d); Reply at 10–13 (App'x 017e–020e).) Indeed, the lack of merit to Plaintiff's disclosure assertions was ultimately evidenced by the voluntary dismissal of the Prior Filed Federal Actions in the face of the Company's supplemental disclosures and the withdrawal of those shareholder plaintiffs' class action challenge to the shareholder vote, and by Plaintiff's own choice not to make any effort to enjoin the Merger.

that of a stockholder, officer, or employee." *Mudgett*, 178 Mich App at 679. Thus, the baseline rule in Michigan is that shareholders may not sue corporate directors and officers directly and must do so through a shareholder derivative action.

A shareholder may deviate from this baseline rule and sue directly in only two narrow sets of circumstances: (1) when the shareholder "has sustained a loss separate and distinct from that of other stockholders generally," *Christner*, 433 Mich at 9 (citation omitted); or (2) when the shareholder "shows a violation of a duty owed directly to him." *Mudgett*, 178 Mich App at 679 (citations omitted). But even a violation of a duty "owed directly to [the shareholder]" will not give rise to direct claim when "the acts complained of resulted in damage *both* to the corporation *and* to the individual." *Id.* at 679–80 (emphasis added). In other words, as Judge Potts stated in this case, "in order to bring his claim against the corporation individually, Plaintiff must show either (1) a violation of duty owed directly him that results in damage to him *that is independent of damage to the corporation*, or (2) a loss *separate and distinct from that of other shareholders*." Potts Order 3 (emphasis added).)

As the Court of Appeals here correctly held, "Defendants' strategic decision to sell and their decisions made in connection with that sale, as well as their general duty to maximize shareholder value, are not duties owed directly to the shareholders that is distinct from, or independent of, the corporation." COA Op. 5 (citing *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 474 (2003)) That holding is correct and proper under the applicable legal framework, as the harm alleged of undervaluing the corporation is first a harm to the corporation itself, while Plaintiff's and other shareholders' alleged harm of receiving less money for their shares is indirect and derivative of that harm to the corporation.

Michigan case law is in accord. In *Elsman v Std Fed Bancorporation*, the Court of Appeals determined that plaintiffs who were allegedly harmed by the "sale of stock at a price substantially less than what it was worth"—and thus, allegedly harmed in the exact same manner as Plaintiff here claims to have been harmed—had not suffered a harm that gave rise to a direct claim. No 206512, 1999 Mich App LEXIS 1371, at *5 (Mich Ct App, Mar 26, 1999) (per curiam) (App'x 023f). While the

court "recognize[d] that . . . plaintiffs were . . . indirectly harmed because they received less money for their shares after the merger, the true harm, if any, was sustained by the company and plaintiffs' harm was derivative." *Id.* Plaintiff conspicuously does not discuss *Elsman* (as he failed to do before the Court of Appeals as well), though an examination of the case makes it clear that Plaintiff's search of and reliance on other jurisdictions is unnecessary. *Elsman* is Michigan case law that squarely resolves the issue.[10]

Additionally, a more recent Michigan case focusing on the language in *Christner* reconfirms that a plaintiff suing directly must show that it incurred an injury that is distinct from that of not just the corporation but also of other *shareholders*. *Karmanos v Bedi*, No 336577, 2018 Mich App LEXIS 3603, at *7–8 (Mich Ct App, Nov 29, 2018) (per curiam) (App'x 004f). In *Karmanos*, the "plaintiffs alleged that [a] breach of fiduciary duties by members of a [corporation's] board of directors," along with the alleged fraud of the acquirer, "resulted in the artificially low valuation of [the corporation's] stock, which in turn resulted in financial loss to plaintiffs." *Id.* at *8. In response, the court noted that "the alleged incorrect valuation of [the corporation's] stock, however, would not have been a loss experienced only by plaintiffs, but rather would have been incurred by all shareholders." *Id.* As such, the court held that the "[p]laintiffs thus have not demonstrated that they sustained a loss separate and distinct from that of other shareholders generally, nor have they shown a violation of a duty owed directly to them and not to the corporation generally." *Id.* The court thus "conclud[ed] that the trial court did not err in finding [the] plaintiffs' claims to be derivative because the claimed injuries would have arisen from breaches of duties owed to the corporation and to all shareholders." *Id.* (citing *Mudgett*, 178 Mich App at 680).

As the Court of Appeals and Circuit Court below indicated in this case, any harm related to the "maximization of shareholder value" allegedly suffered by Plaintiff was derivative of the harm allegedly suffered by the corporation, just as it was in *Elsman*, and was not

[10] Notably, the Circuit Court here thoughtfully applied similar reasoning as the *Elsman* court. *See* Potts Order 4.

separate and distinct from that suffered by all shareholders generally, as it was not in *Karmanos*. *See* COA Op. 4–5; Potts Order 3-5.

As such, Plaintiff's claim, regardless of whether it was brought pursuant to statute or common law, is necessarily derivative and so this action should be dismissed because Plaintiff failed to fulfill the applicable requirements and bring his claim as a derivative action.

C. Plaintiff's Application inappropriately hinges on decisions from other jurisdictions, rather than any Michigan law

Plaintiff does not, and cannot, identify any Michigan Supreme Court or other Michigan court decision contradicting the Court of Appeals' decision here, any conflict among Michigan court decisions, or any tension between Michigan court decisions and applicable statutory provisions. Instead, Michigan decisions are in accord with one another and with the Court of Appeals' decision in this case. As such, there is no "legal principle of major significance to the state's jurisprudence" at issue, nor was the Court of Appeals' decisions "clearly erroneous" or one that would cause "material injustice."

In the absence of any Michigan statutory or case law support, Plaintiff instead hinges his entire argument on scattered cases from a handful of other jurisdictions and the notion that those other jurisdictions come out differently than Michigan, and so this Court should rewrite Michigan's common law (and effectively ignore Michigan's governing statute, MCL 450.1541a) to accord with the jurisdictions Plaintiff prefers that favor Plaintiff's position. Plaintiff's argument, however, is unsupported and fails to warrant appeal.

As a threshold matter, Plaintiff ignores the law in other states that are in accord with existing Michigan law. Several other jurisdictions outside Michigan are consistent with Michigan law on the question presented by this case. See, e.g., *Int'l Bhd of Elec Workers Local No 129 Benefit Fund v Tucci*, 476 Mass 553, 562; 70 NE3d 918 (2017) (affirming the dismissal of a direct claim against the board of directors for undervaluing the acquired corporation "to secure the merger and sale" in a cash-out merger because "the injury posited by the plaintiffs, and

the alleged wrong causing it, fit squarely within the framework of a derivative action" and explaining "undervaluing [the corporation] to secure the merger and sale . . . qualifies as a direct injury to the corporation" and "[f]lowing from that alleged injury is a claimed derivative injury to each shareholder, whose individual shares, as a consequence of the asserted undervaluing of [the corporation] itself, are consequently undervalued as well"); *Somers ex rel EGL, Inc v Crane*, 295 SW3d 5, 12 (Tex App—Houston [1st Dist], 2009) ("Because fiduciary relationships are of an 'extraordinary nature' and should not be recognized lightly, and because of the abundant authority stating that a director's or officer's fiduciary duty runs only to the corporation, not to individual shareholders, we decline to recognize the existence of a fiduciary relationship owed directly by a director to a shareholder in the context of a cash-out merger"); *Frederick,* 2013 Md Cir Ct LEXIS 5, at *33. Thus, Plaintiff's suggestion that Michigan's view on this issue is somehow an outlier needing to be changed is incorrect (and a question for the legislature).

Further, the cases on which Plaintiff relies, all from (and applying law from) other states that Plaintiff has cherry-picked, are distinguishable from and/or inapplicable to the circumstances of this case. (*See* Appl. 8–10.) They thus provide no legitimate basis for upending existing Michigan jurisprudence.

For example, the Maryland decision Plaintiff cites is inapplicable because it defines a cash-out merger as a situation in which "the majority shareholder (or shareholders) of the target company seeks to gain ownership of the remaining shares in the target company," and that "forces" minority shareholders to surrender their interests "[d]ue to the majority's controlling position in the target company." *Shenker v Laureate Educ Inc*, 411 Md 317, 326 n 3; 983 A2d 408 (2009). That is not at all the situation here, where the prospective buyer was not a majority shareholder. Likewise, the Nevada case Plaintiff cites is inapplicable because it involved a stock-for-stock merger (not cash-out, as was the case with the Merger here) and allegations of misconduct against majority shareholders by a minority shareholder. *Cohen v Mirage Resorts, Inc*, 119 Nev 1, 7–9, 19; 62 P3d 720 (2003). While a majority of Covisint's shares, in the aggregate, ultimately voted to approve the

Merger at issue here, there has been no allegation that any one shareholder (or group of shareholders) held a majority of the shares, much less that there was a "majority shareholder" that had sufficient voting power to control and "force" the entire transaction without leaving any opportunity for other shareholders to vote the transaction down. And—as discussed further in Section I.D.2, *infra*—the New Mexico and Louisiana cases Plaintiff cites are inapposite because other aspects of those states' laws also differ materially from Michigan; those cases were driven by the notion that a merger eliminates the now-former shareholder plaintiff's standing and ability to maintain the lawsuit. See *Rael v Page*, 147 NM 306, 310–11; 222 P3d 678 (2009); *Moore v Macquarie Infrastructure Real Assets,* 258 So 3d 750, 757 (La App 3 Cir, Dec 13, 2017). Michigan statutory law, however, expressly rejects that "continuous ownership rule." See MCL 450.1492a(a), (c).

Plaintiff's Application essentially boils down to arguing that Michigan, via this Court, should ignore MCL 450.1541a, upend its existing and consistent case law, and wholly change its approach to this issue simply because some other, inapplicable and non-binding jurisdictions come out differently on the issue. Such judicial activism and rewriting of the law is inappropriate (particularly given the fact that Plaintiff's cases are readily distinguishable from the circumstances and law here). See *Tucci*, 476 Mass at 562–63 (declining invitation to "change our approach and follow these corporate law jurisdictions, including in particular Delaware, that treat the plaintiffs' type of claim – a challenge to the fairness of a merger transaction on the ground that the consideration is inadequate—as a direct rather than a derivative claim"). Plaintiff may now be unhappy with the law in Michigan (the jurisdiction he chose and then fought to return to after Defendants removed to federal court), but that is no reason to alter the law as Plaintiff urges.

D. Plaintiff's first and primary argument—that the decisions of Michigan courts correctly finding claims such as Plaintiff's derivative leaves shareholders with no legal recourse—is legally wrong and factually deficient

Plaintiff primarily argues that Michigan's case law finding claims such as Plaintiff's derivative effectively leaves shareholders with no legal recourse to challenge a merger they believe is improper. (Appl. 7–10.) Plaintiff's argument fails for a number of reasons, each independently sufficient to affirm the Court of Appeals' decision.[11]

1. Michigan authority does not support Plaintiff's argument

Plaintiff notably does not and cannot cite any Michigan authority supporting his position. (Appl. 7–10.) That is because Michigan case law on this issue is well-developed, established, consistent, and favorable to Defendants' argument that Plaintiff's claim is derivative. (See, e.g., *id.* 7–8 (conceding Michigan cases have found claims such as Plaintiff's derivative).)

In the absence of any support in Michigan law, Plaintiff points to cases from other jurisdictions applying other states' laws. (Appl. 8–10.) That is inappropriate and fails to establish a basis for appeal, including because the cases cited are distinguishable and inapplicable here, as discussed in Section I.C, *supra*.

Plaintiff also repeatedly cites and heavily relies upon a 2006 Texas journal article about *limited liability company* law—Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability*

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[11] In addition to the reasons discussed *infra*, Plaintiff did not clearly raise this argument before the Circuit Court or the Court of Appeals. (See generally Opp. (App'x 027d); Appellees' Ex. 12 (*Murphy v. Inman* MSD Hr'g Tr., June 13, 2018) (App'x 003d); Plaintiff-Appellant's Brief in Court of Appeals, Apr. 1, 2019; Plaintiff-Appellant's Reply Brief in Court of Appeals, June 24, 2019.) Accordingly, the argument is waived, and Plaintiff's Application should be denied. See Section I.B.2.a, *supra*.

Companies, 58 Baylor L Rev 63, 88-110 (2006). (*See* Appl. 9–11, 16 (citing Kleinberger article 8 times).) Plaintiff attempts to justify his over-reliance on that journal piece by arguing it "has been cited by at least twelve different courts tasked with distinguishing between direct and derivative claims." (Appl. 9 n 3.) However, those citations do not render the article an authority or in any way binding, nor do they indicate the article dictates the outcome Plaintiff seeks here.[12]

Given that Plaintiff's argument is contradicted by and unsupported by any Michigan law and that Plaintiff relies entirely on (inapplicable) cases from a handful of other jurisdictions and an out-of-state journal article, Plaintiff fails to establish any legitimate basis for appealing the Court of Appeals' decision and turning Michigan law on its head.

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[12] Indeed, several of the cases simply cited the Kleinberger article for the notion that the derivative-versus-direct frameworks for claims involving corporations are applicable to claims involving limited liability companies. See, e.g., *In re Senior Cottages of Am, LLC*, 482 F3d 997, 1001 (CA 8, 2007); *Veros Software, Inc v First Am Corp*, No SACV 06-1130 JVS (ANx), 2008 WL 11338610, at *5 (CD Cal, June 13, 2008) (App'x 133f) (also finding, in the LLC context, the Kleinberger article tends to support the conclusion "that a derivative action is wholly appropriate, and in fact necessary, where the injury is suffered first by the entity"). Many of the cases likewise cited the Kleinberger article solely for other points not relevant or in dispute here. See, e.g., *Saia v Flying J Inc*, No 16-5853, 2017 WL 6398013, at *2 (CA 6, July 11, 2017) (App'x 140f) (citing Kleinberger article for basic notion that derivative claim belongs to the entity and owner has no standing to bring claim except on behalf of entity). And several of the cases concluded that the claims at issue were derivative, not direct. See, e.g., *id*. at *2; *Keller v Estate of McRedmond*, 495 SW3d 852, 882 (Tenn, 2016); *Dinuro Invs, LLC v Camacho*, 141 So 3d 731, 740 (Fla 3d Dist Ct App, 2014); *Billings v Bridgepoint Partners, LLC*, 863 NYS2d 591, 593–94, 596 (NY Sup Ct, 2008); *Fritchel v White*, 452 P3d 601, 605–06; 2019 WY 117 (Wyo, 2019).

2. Plaintiff's argument that he is left with no recourse is false

The primary thrust of Plaintiff's appeal is that if his breach of fiduciary duty claim is deemed derivative, as the Court of Appeals and Circuit Court found here, he and other shareholders are left without legal recourse. (See, e.g., Appl. 1, 7.) However, that is simply not true.

The most obvious answer to Plaintiff's argument is that shareholders' primary recourse to oppose a merger is to voice their objections and vote against the merger. Indeed, here objections were raised and disclosed to shareholders prior to the vote. Ultimately, though, the Merger here was approved by a majority shareholder vote. This is the elephant in the room in this case that Plaintiff attempts to ignore and distract from. Covisint's shareholders had recourse to oppose the Merger via their vote; they exercised that right here, and a majority approved the Merger. Yet Plaintiff would undo and overturn the will of the majority of shares simply because he is not satisfied. Plaintiff cites no authority supporting such a gambit, and indeed there is none.

Additionally, there were legal processes Plaintiff could have pursued but chose not to.

For example, Plaintiff could have made a demand on the Covisint board and then brought a derivative action, as set out in and required by Michigan law. See MCL 450.1493a (including provision permitting exception to usual 90-days-after-demand waiting period to avoid irreparable harm). Plaintiff here simply elected not to. Plaintiff argues that no rational shareholder would pursue a derivative claim, but his argument is meritless and based on inapposite, distinguishable cases from different jurisdictions with different laws. (Appl. 9-10.)

Plaintiff for this argument quotes a case from New Mexico, *Rael*, for the notion that deeming a claim to be derivative allows misconduct to "escape review by the fortuity of the intervening merger." 147 NM at 310–11 (cited and quoted at Appl. 9). However, the New Mexico Court of Appeals in that passage was referring to the implication of that state's continuous ownership rule (i.e., in New Mexico a derivative plaintiff must remain a shareholder throughout the suit, so the merger

eliminates the plaintiff's standing). *Id*. Critically, in contrast to the New Mexico law applicable in *Rael*, Michigan law does not recognize the continuous ownership rule; under Michigan law, if a plaintiff was a shareholder at the time of the alleged misconduct and only ceased to be a shareholder by virtue of a corporate action in which the shareholder did not acquiesce (like Plaintiff here), he continues to have standing to bring and maintain a derivative action. MCL 450.1492a(a), (c). *Rael* is thus inapposite.

The other case Plaintiff relies on, the Louisiana state court case *Moore*, is comparably unavailing because its decision is similarly driven by the notion that the former shareholder plaintiff has no standing to maintain a derivative suit post-merger, which is not the case under Michigan law due to MCL 450.1492(c)'s express rejection of the continuous ownership rule. See 258 So 3d at 757 (cited at Appl. 9–10).

Thus, Plaintiff's attempt to argue that pursuing a derivative claim would be fruitless and irrational is meritless. Indeed, courts disagree that derivative relief is inadequate in situations like this. See *Tucci*, 476 Mass at 563–64 (in response to argument that if plaintiff had pursued derivative proceeding, company would have consummated merger prior to conclusion of suit, "disagree[ing] that this means it is unfair or inequitable to require the plaintiffs and similarly situated shareholders to pursue derivative relief" and finding could have but did not pursue derivative demand and that nothing indicates derivative route would be "hollow or inadequate" relief). Moreover, Plaintiff's argument fails to overcome the fundamental fact that Michigan law does not provide for a direct claim in these circumstances, and he is impermissibly asking this Court to rewrite Michigan law (including to follow other jurisdictions with *different* laws) to ameliorate his failed litigation strategy. This Court should not countenance Plaintiff's misguided effort.

Additionally, Plaintiff could have joined other shareholders in the Prior-Filed Federal Actions and, with them or separately, could have moved to enjoin the shareholder vote from proceeding, but (again) Plaintiff simply chose not to. Indeed, the plaintiffs in the Prior-Filed Federal Actions did just that—they moved for a preliminary injunction, but later withdrew their motion and voluntarily dismissed their cases upon acknowledging that Covisint's supplemental proxy statements

mooted any claims based on alleged deficiencies. (*See* Appellees' Exs. 6 at 1, 10 at 2–5 (App'x 186c, 206c–209c).) Particularly given that the plaintiffs in the Prior-Filed Federal Actions so moved, it is striking that Plaintiff made no effort to enjoin the vote despite having filed suit several weeks prior to the vote. (Compare Appl. 5 (conceding Plaintiff filed his initial complaint on June 30, 2017), with Appellees' Ex. 9 (App'x 202c) (shareholder vote consummating Merger held on July 25, 2017).)

Having elected not to pursue these options available to him, Plaintiff is no position to protest that the lower courts' decisions mean he had no legal recourse. As the above demonstrates, he had several avenues for potential recourse, but he decided not to pursue any of them (and in the case of the shareholder vote, he was outvoted by the majority that approved the Merger). Accordingly, Plaintiff's framing of the issue—"Whether shareholders of Michigan corporations have standing to bring direct claims against directors and officers for breaching their fiduciary duties in connection with orchestrating an unfair cash-out merger, or rather, as the Court of Appeals effectively held, such shareholders have no legal recourse in Michigan"—is a false dichotomy. The Court of Appeals did not effectively hold that such shareholders have no legal recourse in Michigan, just that they cannot bring direct claims under state law. The above-described avenues of recourse are available; Plaintiff here purposefully elected not to, or neglected to, pursue them.

It is telling that in the Application's conclusion, Plaintiff attempts to frame the issue by block-quoting the Kleinberger article setting out a hypothetical in which managers were grossly negligent and "[t]he gross negligence comes to light only after the merger has become effective." (Appl. 16.) Indeed, Plaintiff argues as if he is an aggrieved shareholder who only learned of the supposed "misconduct" after the Merger was consummated, but that is plainly not the scenario here, where Plaintiff filed suit and lodged his allegations *before* the vote on the Merger and the various alleged issues Plaintiff raises were disclosed in the proxy statements preceding the Merger vote. (Compare Appl. 5, with Appellees' Ex. 9 (App'x 202c); see also Appellees' Exs. 2 at 60–62, 3–5, 7–8 (App'x 069b–071b, 003c, 173c, 179c, 189c, 196c.) That Plaintiff must distort reality and rely on a scenario fundamentally different than the actual facts here to obscure the various avenues of recourse available to

him underscores that Plaintiff's argument about lacking recourse is meritless.

E. Plaintiff's second argument—that the Court of Appeals here and in other cases misapplied the common law test for distinguishing derivative and direct claims and the Michigan Supreme Court has never "meaningfully addressed" the issue—mischaracterizes Michigan law

Plaintiff's remaining argument is that the Michigan courts in the existing case law (including the Court of Appeals in this case) misapplied the common law test for distinguishing derivative versus direct claims and that this Court has never "meaningfully addressed" the issue and so should now clarify the law. (Appl. 10–15.) Plaintiff's second argument fares no better than his first argument.

1. The Michigan Supreme Court *has* addressed this issue

A premise of Plaintiff's argument is that this Court has never addressed this issue and so it should speak up now, (*see* Appl. 10), but that premise is false. The Michigan Supreme Court has addressed this issue, in *Christner*, 433 Mich 1. Plaintiff attempts to evade this fatal deficiency in his argument by incorrectly positing the Supreme Court in *Christner* did not "meaningfully" address the issue "in a thorough opinion with a clear holding," contending the Court "simply 'agree[d] that [the] plaintiff' there could maintain an individual action without further elaboration on the common law test applied in that case." (Appl. 10, 12–13.) But that is clearly wrong. This Court in *Christner* quoted and expressly agreed with the rationale of the Court of Appeals in that case that "'[a] stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally.'" 433 Mich at 9. Because the premise of this argument is false, the argument correspondingly fails.

2. Plaintiff again improperly relies exclusively on cases from other jurisdictions to manufacture his argument that Michigan courts misapplied Michigan common law

The remainder of Plaintiff's second argument attempts to minimize the considerable body of applicable Michigan case law (because it undermines Plaintiff's position) by contending that the Court of Appeals in this case and other Michigan cases misapplied the common law test for distinguishing derivative and direct claims. (Appl. 12.) However, as purported support for his claim that the Michigan courts have misapplied the common law test, Plaintiff simply points (again) to cases from *other* jurisdictions. (Appl. 12–15.) Plaintiff cites no Michigan authority, and there is none, demonstrating how the Court of Appeals here and in other cases supposedly misapplied the *Michigan* common law. (*Id.*)

In essence, Plaintiff in illogical fashion posits that Michigan courts misapplied Michigan common law because they did not apply certain *other jurisdictions'* common law. The fallacy of Plaintiff's argument is plain; *Michigan* common law is to be applied in Michigan courts and cases, not *other states'* common law. Arguing that some *other states'* common law would come out differently does not establish that Michigan "misapplied" *its* common law. Ultimately, Plaintiff's argument boils down to a reprise of his erroneous insistence that this Court revise Michigan law to mirror a handful of other states that purportedly are more favorable to Plaintiff. Michigan law already has a well-developed statutory scheme and body of case law setting out how a litigant like Plaintiff could bring a claim of the variety he purports to bring, Plaintiff simply declined to follow it. Plaintiff presents no reason this Court should substitute itself for the Michigan legislature and rewrite Michigan law to remedy Plaintiff's failed gambit.

Accordingly, the Court of Appeals' decision should be affirmed and this action should be dismissed.

II. The lower courts' decisions granting summary determination for Defendants also can be separately affirmed on the independent grounds that the majority shareholder vote approving the Merger defeats Plaintiff's claim

Separate and apart from the issues arising from the derivative nature of Plaintiff's claims, the FAC independently failed to state a claim because the alleged wrongdoing, culminating in the Merger, was approved by a majority vote of shares. To be clear—the Court of Appeals and the Circuit Court did not need to reach and did not in fact reach this issue, given that they dismissed Plaintiff's action based on his failure to comply with the statutory requirements for commencing his necessarily derivative lawsuit. See COA Op. 5 n 3; see generally Potts Order. However, it is also clear that the ratification of this Merger by the shareholders is an independently sufficient basis for dismissing Plaintiff's claims, and as a matter of law compels dismissal. See *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41 (1994) (it is well established that an appellee can argue an alternate ground for affirmance not relied upon by the trial court and need not cross-appeal); *Burns v Rodman*, 342 Mich 410, 414 (1955).

Plaintiff alleged in conclusory terms, and without meaningful factual support, that Defendants and Covisint's executive officers were "interested." (*See* FAC ¶ 9 (App'x 040e).) Defendants dispute that allegation, but in all events, whether they or any officers could be deemed be "interested" is immaterial here because dismissal is warranted either way.

If Defendants and Covisint's executive officers were "interested," as Plaintiff alleges, then Plaintiff's claim is barred by MCL 450.1545a. That statute provides that in an action by a shareholder, a merger may not be "set aside, or give rise to an award of damages, because of a director's or officer's alleged interest if the "material facts of the [merger] and the director's or officer's interest were disclosed or known to the shareholders entitled to vote" and the merger was approved by "the majority of votes cast" by disinterested shareholders. MCL 450.1545a(1)(c), (3). A claim of breach of fiduciary duty pursuant to Section 541a is subject to, and may be precluded by, Section 545a.

Camden v Kaufman, 240 Mich App 389, 393–94 (2000) (per curiam). In particular, approval of a merger by a majority of disinterested voting shareholders bars a Section 541a claim for breach of fiduciary duty against directors who allegedly failed to obtain maximum value because of their self-interest. *Id.* at 393–97; see also MCL 450.1545a. Plaintiff's claim is thus barred under this standard.

The FAC alleges "Defendants and remaining Covisint executive officers collectively owned 1,904,945 shares." (FAC ¶ 9 n 4 (App'x 040e).)[13] Subtracting that number from both the 35,103,897 shares that cast votes and the 21,331,741 shares that voted to approve the Merger results in 19,426,796 out of 33,198,952 (i.e., 58.52%) disinterested voting shares approving the Merger.[14] Thus, because "a majority of the votes cast" by the informed disinterested shareholders approved the Merger, Plaintiff's Section 541a claim alleging Defendants were self-interested and failed to maximize shareholder value in the Merger fails as a matter of law, because it is barred by Section 545a. *Camden*, 240 Mich App at 393–94 (affirming summary disposition of a Section 541a claim for failure to maximize shareholder value in a merger against interested directors because the merger was approved by a majority of informed and disinterested shareholders pursuant to Section 545a).

If Defendants and Covisint's executive officers were disinterested, as Defendants maintain, then Plaintiff's claim additionally would be barred by Delaware law regarding shareholder approval.[15] The Supreme

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[13] Defendants do not concede that they and Covisint's executive officers actually owned 1,904,905 shares, as Plaintiff alleges, and instead believe the relevant number of shares to be smaller. Nevertheless, for purposes of this analysis, Defendants rely on Plaintiff's alleged figure, which is more favorable to Plaintiff yet still results in dismissal.

[14] The FAC mistakenly calculates the percentage of disinterested *outstanding* shares approving the Merger, which is not the standard under Michigan law where interest is alleged. (FAC ¶ 9 (App'x 040e).)

[15] This question is not clearly addressed by Michigan law. "In the absence of clear Michigan law on matters of corporate law, Michigan courts often refer to Delaware law." *Glancy v Taubman Ctrs, Inc*, 373

Court of Delaware has held that when a merger does not involve a controlling stockholder and it is approved by "a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." *Corwin v KKR Fin Holdings LLC*, 125 A3d 304, 309 (Del, 2015); *see id.* at 313–14 (commenting regarding the business judgment rule that "judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of the directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders)").[16] The "legal effect" of such shareholder approval of the merger is that "the business judgment rule applies and insulates the transaction from all attacks other than on the ground of waste, even if a majority of the board approving the transaction was not disinterested or independent." *Id.* at 308 n 13 (quoting *In re KKR Fin Holdings LLC S'holders Litig*, 101 A3d 980, 1001 (Del Ch, 2014), *aff'd sub nom Corwin*, 125 A3d 304); *accord*

F3d 656, 647 n 16 (CA 6, 2004) (citing *Russ v Fed Mogul Corp*, 112 Mich App 449 (1982)); see also *Priddy v Edelman*, 883 F2d 438, 443–44 n1 (CA 6, 1989); *Adelman v Compuware Corp*, No 333209, 2017 Mich App LEXIS 2036, at *2 (Mich Ct App, Dec 14, 2017) (per curiam) (App'x 100f). This differs from Plaintiff's attempt to rely on other jurisdictions for the derivative-versus-direct analysis, because there is already clear Michigan law on that issue.

[16] The onerous-for-Plaintiff standard of the irrebuttable business judgment rule, rather than the comparatively less exacting-for-Plaintiff entire fairness standard, applies here because there are no allegations the Merger "involved a controlling shareholder, much less that a controlling shareholder pushed [Covisint] into a conflicted transaction in which the controller received non-ratable benefits." *Larkin v Shah*, CA No 10918-VCS, 2016 Del Ch LEXIS 134, at *4 (Del Ch, Aug. 25, 2016) (App'x 112f); *see id.* ("In the absence of a controlling stockholder that extracted personal benefits, the effect of disinterested stockholder approval of the merger is review under the irrebuttable business judgment rule, even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors.").

Camden, 240 Mich App at 396 ("[O]nce proper approval of an interested transaction is obtained, the type of challenges available are limited to waste, fraud, illegality, or the like."); see also *Singh v Attenborough*, 137 A3d 151, 151–52 (Del, 2016) ("When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful." (footnotes omitted)); *In re Volcano Corp Stockholder Litig*, 143 A3d 727, 729, 737–50 (Del Ch, 2016), *aff'd* 156 A3d 697 (Del, 2017).[17]

Here, if Defendants and Covisint's executive officers were disinterested, there can be no dispute that the Merger was approved by a fully informed majority of disinterested shares (52.17% of outstanding shares (FAC ¶ 9 (App'x 040e); Appellees' Ex. 9 (App'x 201c)), and 60.76% of voting shares (Appellees' Ex. 9 (App'x 201c)). The vote thus invoked the protections of the irrebuttable business judgment rule. Moreover, Plaintiff has not alleged, nor could he, that Defendants' actions amounted to "waste" of corporate assets; "waste" was not even mentioned in the FAC, nor in Plaintiff's opposition to the Motion for Summary Disposition or his Opening Brief on appeal. Neither has Plaintiff pled or argued fraud or illegality, or misconduct rising to the level of bad faith.

In short, under shareholder ratification doctrines, Plaintiff's claim fails whether Defendants are deemed "interested" or "disinterested." If Defendants are "interested," as Plaintiff alleges, then MCL 450.1545a applies and bars Plaintiff's claim because a majority of the "disinterested" votes cast approved the merger. Meanwhile, if Defendants are "disinterested," as Defendants maintain, then there is

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[17] Like Delaware courts, Michigan courts generally defer to the business judgment of directors and avoid interfering with a transaction in the absence of fraud or bad faith. *In re Estate of Butterfield*, 418 Mich 241, 255 (1983) (explaining that courts are "reluctant to interfere with the business judgment and discretion of directors in the conduct of corporate affairs," and will not do so "[i]n the absence of bad faith or fraud"); *Camden*, 240 Mich App at 400–02.

no clear Michigan law on point and so Delaware law applies and bars Plaintiff's claim based on the disinterested vote approving the merger.

Accordingly, this Court and can and should affirm the Court of Appeals' decision and dismissal of this action on this separate, independently sufficient ground as well.

CONCLUSION AND RELIEF REQUESTED

In light of the foregoing, Defendants respectfully contend and request that Plaintiff's Application be denied and that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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Date: July 22, 2020

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 11,096 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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